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IN THE

Supreme Court of the United States

October Term, 1966.

No. 1033

AARON DANIEL,

Petitioner,

v.

SKIBS A/S HILDA KNUDSEN and CHRISTIAN HAALAND and BOISE GRIFFIN STEAMSHIP COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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AARON DANIEL,

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SKIBS A/S HILDA KNUDSEN AND CHRISTIAN HAALAND AND BOISE GRIFFIN STEAMSHIP COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Aaron Daniel by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 3, 1966.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found in 368 F. 2d 179 (C. A. 3, 1966) (page 11, *infra*). This is the final judgment of the United States Court of Appeals for the Third Circuit where judgment was entered for Respondents affirming the judgment of the United States District Court for the Eastern District of Pennsylvania. The opinion of the District Court is to be found in 253 F. Supp. 758 (E. D. Pa. 1966).

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 3, 1966 (page 14, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Did granting of Judgment notwithstanding the verdict by the trial judge usurp the function of the jury which decided under the evidence that petitioner was involved in the unloading of a vessel and deny petitioner right to trial by jury under Seventh Amendment?

2. Does the warranty of seaworthiness apply to men in the service of a vessel injured on shore but while assisting in the unloading of the vessel?

3. Will essential equipment used by men on shore in connection with unloading procedure be considered vessel's equipment though not physically connected to vessel in any way?

CONSTITUTIONAL PROVISION AND THE STATUTE INVOLVED.

1. Constitution of the United States, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The Extension of Admiralty Jurisdiction Act, 46 U. S. C. Section 740, the pertinent portion of which reads as follows:

> "The Admiralty and Maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

STATEMENT OF THE CASE.

Plaintiff brought an action to recover damages from the owners and operators of the S. S. "CONCORDIA FONN" for injuries sustained on September 29, 1961. Jurisdiction of the District Court was invoked because of the diversity of citizenship between the parties and because of the application of the admiralty law.

The action was tried before the Court and jury and resulted in a verdict for plaintiff in the sum of $10,000, judgment being entered thereon on October 19, 1965.

Defendant's Motion for Judgment N. O. V. was granted on April 28, 1966 and affirmed by the Court of Appeals for the Third Circuit.

This accident involved a cargo of licorice root which was being discharged from the S. S. "Concordia Fonn" at the MacAndrews and Forbes pier, Camden, New Jersey. The cargo, while in the holds of the vessel was owned by MacAndrews and Forbes, manufacturers of licorice (N. T. 174). MacAndrews and Forbes, not the owners of the vessel or its agents, employed Murphy Cook Co., to unload the ship (N. T. 176).

In connection with the unloading, Murphy Cook hired some men in Philadelphia and hired others in Camden. For example, the plaintiff was hired in Camden and assigned to work in a warehouse next to the pier. Joseph Dupree and Earl Wagner, fork lift operators, were hired in Philadelphia, but assigned to work in and about the warehouse. Other men were hired and assigned to work on the ship. Wherever the men were assigned to work, all received the same salary and all worked when the ship was being unloaded. While there were different foremen for each gang on the ship and for the gang in the warehouse, it was shown that Gomez, the warehouse foreman, worked in conjunction and as part of an overall team with the other foreman. He could and would visit the vessel to see how the work there was progressing.

The vessel had been unloading at the pier for 3 days before September 29, 1961 (N. T. 208). W. H. Jones, marine supervisor for MacAndrews and Forbes, stated that each bale weighed about 350 pounds and that about 200 were discharged per hour from each hold.

It was stipulated that bad weather, such as rain, had an adverse and harmful effect upon the bales of licorice root. Testimony further showed that the MacAndrews and Forbes Pier was an open pier without any storage or cover facilities whatsoever (N. T. 199). There was no testimony from Jones that there were any other warehouse facilities available for the cargo.

The procedure which was followed on the day of the accident by Murphy Cook's men was to bring the bales of licorice root out of the hold to land them on a railroad flat car or cars which ran on a track which led from the pier to the warehouse. Certain men assisted in this operation standing on a platform on the pier next to the vessel—which platform had been placed in position by Murphy's fork lift operators using Murphy's fork lift trucks (N. T. 87).

The filled railroad car was taken down the pier to a point in front of the warehouse where the fork lift operators (Murphy Cook's men) would lift it off the car and take it into the warehouse. The railroad car which was operated by a MacAndrews employee would then return to the ship side for another load.

Once the cargo was in the warehouse it was necessary to stack the bales since there was not sufficient room in the warehouse to place the cargo without placing them in tiers or stacking them in some way (N. T. 115, 123, 124).

In order to raise the bales for sacking the Murphy Cook men in the warehouse used a procedure in which a pulley or block is hung to a rafter by what has been termed a "hanger rope." A line fed through the pulley had a set of tongs attached to one end while the other is wound around a "hold and turn motor."

The fork lift operator takes the cargo from the flat car and brings it into the warehouse. Petitioner's job was to hook on the gongs (similar to ice tongs) to the draft and signal the operator of the motor (also a Murphy Cook man) to raise the draft so that other Murphy Cook men working on the piles of bales could stack it.

Petitioner was injured when the hanger rope broke, causing the block to fall and strike him in the chest.

The hanger rope was originally owned by MacAndrews and Forbes but given to Murphy Cook's men, who spliced the rope, for use in this operation. The rope did not break at the splice. The block or pulley used was also owned by Murphy Cook.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below in the instant case is in conflict with the decisions of the Supreme Court regarding the determination by a jury of the status of an injured worker seeking recovery under the unseaworthiness doctrine, namely, *Seas Shipping Co. v. Sieracki,* 328 U. S. 85; 66 S. Ct. 872, 90 L. Ed. 1099; *Guitterez v. Waterman, S. S. Corp.,* 373 U. S. 206; 83 S. Ct. 1185, 10 L. Ed. 2d 297; *Grimes v. Raymond Concrete Pile Co.,* 356 U. S. 252, 78 S. Ct. 687, 2 L. Ed. 2d 754.

Since the landmark case of *Seas Shipping v. Sieracki, supra,* the protection of the doctrine of unseaworthiness has been made available to longshoremen and other workers who perform the work previously done by members of the crew before division of labor skills made it economically unsound for crew members to perform all such functions.

In *Guitterez v. Waterman S. S. Corp., supra,* this court extended the warranty of seaworthiness to longshoremen injured in the unloading process even if the accident happened upon the pier. The court found that the situation came within the Extension of Admiralty Jurisdiction Act, 46 U. S. C. Sec. 740.

This court has consistently held that the status of a claimant as a crew member so as to maintain recovery under the Jones Act, 46 U. S. C. Sec. 688 was a question of fact or a mixed question of law and fact to be decided by a jury.

In *Grimes v. Raymond Concrete Pile Co., supra,* the court stated:

> "We hold further, however, in disagreement with the Court of Appeals that the petitioner's evidence presented an evidentary basis for a jury's finding whether or not the petitioner was a member of the crew of any vessel."

While the instant action was not a claim under the Jones Act, but a claim under general maritime law, by a longshoreman allegedly doing work formerly done by members of the vessel's crew, it still presents a question of the development and expansion of the admiralty concept of unseaworthiness.

It would indeed seem incongruous for this court to take such protective steps to safeguard a party's right to a jury on the question of crewman status and not to so hold for longshoreman doing crewman's work. See also *Senko v. La Crosse Dredging Corp.*, 352 U. S. 370, 77 S. Ct. 415, 1 L. Ed. 2d 404, and *Texas Co. v. Gianfala*, 350 U. S. 879, 76 S. Ct. 141, 100 L. Ed. 775.

2. The decision of the Court below in the instant case is in direct conflict with the decision of the Ninth Circuit Court of Appeals in *Pope and Talbot, Inc. v. Cordray*, 358 F. 2d 214 in its determination that the taking of cargo from shipside to its place of storage was not employment in the service of the ship and in the unloading process.

This nation has one of the world's largest maritime fleets and its ports and marine facilities are unrivaled in scope. Its maritime workers, longshoremen, ship cleaners, pipefitters, etc., seek certainty of protection under the law in one of the most hazardous industries in our country.

Should taking of cargo from ship's side to a land based warehouse for storage be considered "unloading" on West Coast while not in the East? For this would be the result since in *Pope and Talbot, Inc., v. Cordray, supra*, it was held:

> "The test is, what was the nature of his work? He was performing a service for the ship in the discharge of its cargo. His employer was under contract with the shipowner to take the cargo from the shipside and to put it in a place of storage, and appellee was engaged in the performance of this work. The appellee's work was the work of a longshoreman and he was

entitled to seaworthy gear while he was performing his services."

3. The lower court's dictum concerning the breaking of the rope is also in direct conflict with the decisions of this court regarding the difference in conceptual thinking between an absolute duty to provide a safe place to work under the general maritime law and the theory of negligence under common law.

The lower court finds that the rope that broke was owned by the consignee of the cargo and used in its warehouse and therefore was not part of the ship's tackle or appurtenances which the vessel's owners were required to keep in good workable condition.

Unfortunately, the words of the lower court sound in negligence based upon right and duty of inspecting the rope in question. In *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941, this court put to rest the use of common law negligence concepts when dealing with an unseaworthy condition.

In *Italia Societa v. Oregon Stevedoring Co.*, 376 U. S. 315, 84 S. Ct. 763, 11 L. Ed. 2d 743, it was noted:

> "If the owner engages others to supply the equipment necessary to stevedoring operations, he must still answer to the longshoremen if the gear proves to be unseaworthy."

In a recent decision in the Fifth Circuit Court of Appeals in *Deffes v. Federal Barge Lines, Inc., et al.*, 361 F. 2d 422, it was held that a land based machine used to remove grain from a vessel would be essential equipment in unloading the vessel and failure of such equipment would subject shipowner to liability though it never inspected or controlled the equipment involved.

For the sake of maximum clarity to the industry, it is submitted that true test should be whether the equipment used was reasonably essential in the unloading process and

its use foreseeable. Failure of such equipment would expose to liability the shipowner who has a non-delegable duty to provide proper tools. The shipowner in turn could be protected by a possible indemnity claim against the stevedoring company involved under *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HARRY R. KOZART,
Counsel for Petitioner.

BENJAMIN KUBY,
KLOVSKY, KUBY AND HARRIS,
Of Counsel.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15965

AARON DANIEL,

Appellant

v.

SKIBS A/S HILDA KNUDSEN AND CHRISTIAN HAALAND AND BOISE-GRIFFIN STEAMSHIP COMPANY, INC.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 20, 1966

Before MARIS, MCLAUGHLIN and KALODNER, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 3, 1966)

PER CURIAM:

The plaintiff was injured in the course of stacking bales of licorice root in a warehouse belonging to MacAndrews & Forbes Company in Camden, New Jersey. The bales of licorice root, which were owned by MacAndrews &

Forbes and consigned to them, had been discharged from the defendants' vessel, the Concordia Fonn, by two gangs of longshoremen onto flat railroad cars owned by MacAndrews & Forbes and standing on tracks on its pier alongside the vessel. As the cars were loaded they were pulled along the tracks leading from the pier to one of MacAndrews & Forbes' warehouses on shore by an engine owned by MacAndrews & Forbes and operated by one of its employees. The bales were unloaded from the flat cars, brought into the warehouse by forklift trucks and dropped on the warehouse floor. It was at this point that the gang of laborers, of which the plaintiff was a member, which had been hired by Murphy Cook Company, the stevedoring firm which had also provided the two gangs of longshoremen working at ship's side, took the bales over and stacked them in the warehouse. The bales were raised by means of a rope and tongs device rigged through a block suspended from the ceiling by a hanger rope. All this equipment, except the block, was owned by MacAndrews & Forbes. The plaintiff's job was to hook the tongs to a bale and give the signal to raise it. He was injured when the hanger rope supporting one of the lifting devices broke causing the block to fall on him.

Alleging himself to have been a longshoreman engaged in the unloading of the Concordia Fonn the plaintiff sued the defendants as owners of the vessel for damages for his injuries based upon the unseaworthiness of the hanger rope which was claimed to be an appurtence of the vessel. Upon the trial of the case in the district court the jury rendered a verdict for $10,000.00 in favor of the plaintiff. Thereafter upon motion of the defendants the court entered judgment in their favor n.o.v. In directing the entry of judgment n.o.v. District Judge Joseph S. Lord III filed a well reasoned opinion, 253 F. Supp. 758, in which he stated the facts, carefully analyzed the authorities, and concluded that the facts did not support the jury's finding that the plaintiff was engaged in unloading the vessel, because the

unloading ended with the delivery of the cargo to the consignee, MacAndrews & Forbes, on board their flat cars. So holding, he did not pass upon the question whether the rope of MacAndrews & Forbes which broke in the warehouse and caused the plaintiff's injury was an appurtenance of the vessel which was covered by the warranty of seaworthiness. Finding ourselves in complete accord with the reasoning and conclusions of Judge Lord we affirm the judgment for the reasons well stated in his opinion.

We merely add that in our opinion the judgment finds support also in the fact that the rope belonging to the consignee and in its warehouse on shore, the breaking of which caused the plaintiff's injury, could hardly be regarded as a part of the ship's tackle or an appliance appurtenant to the vessel which her owners were required to maintain in good workable condition under their warranty of seaworthiness. Compare Crumady v. The Joachim Hendrik Fisser, 1959, 358 U. S. 423; Thompson v. Calmar Steamship Corporation, 3 Cir. 1964, 331 F. 2d 657; Spann v. Lauritzen, 3 Cir. 1965, 344 F. 2d 204.

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15965.

AARON DANIEL,

Appellant

v.

SKIBS A/S HILDA KNUDSEN AND CHRISTIAN HAALAND AND BOISE-GRIFFIN STEAMSHIP COMPANY, INC.

(D. C. Civil No. 30778)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, MCLAUGHLIN and KALODNER, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 28, 1966, be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF,
Clerk.

November 3, 1966.